

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CHINA MART USA LLC

a California limited liability company,

CASE NO: 1:12-cv-00968

Plaintiff and Counterclaim Defendant,

Hon. Robert J. Jonker

v.

AMERICAREERS, LLC d/b/a CHINA MART, LLC

a Michigan limited liability company,

Defendant and Counterclaim Plaintiff.

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Defendant

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AMERICAREERS LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rules of Civil Procedure Rule 56, Defendant and Counterclaim Plaintiff, AmeriCareers LLC d/b/a China Mart, LLC (hereinafter "Defendant", "AMC" or "ACL"), by and through its attorney, hereby moves the Court for Partial Summary Judgment in Defendant's favor on the following issues:

- (1) Defendant's rights in and to "ChinaMart.com" are superior to China Mart USA LLC's (hereinafter "Plaintiff's") rights in Plaintiff's alleged marks "China Mart" and "ChinaMart";
- (2) All Plaintiff's claims are barred by the statutes of limitations and the doctrines of laches, unclean hands, fair use and estoppels;
- (3) The terms "China mart" and "Chinamart" are generic when referring to China market or China trading center, or a place for selling or buying Chinese goods;
- (4) Plaintiff's alleged marks "China Mart" and "ChinaMart" are generic when used in connection with services recited in Plaintiff's two federal registrations at issue; and in the alternative, Plaintiff's alleged marks "China Mart" and "ChinaMart" are descriptive when used in connection with services recited in Plaintiff's two federal registrations at issue;
- (5) In the event Plaintiff's alleged marks "China Mart" and/or "ChinaMart" are deemed valid, Defendant has not infringed Plaintiff's alleged trademark rights;
- (6) Plaintiff has committed fraud on the U.S. Patent and Trademark Office (the PTO);
- (7) Plaintiff's alleged marks were not distinctive at the time of registration of the domain name "chinamart.com," and Defendant has not violated Anticybersquatting Consumer Protection Act (ACPA);

Because there is no genuine issue of material facts regarding these issues, Defendant is entitled to summary judgment as a matter of law. Defendant respectfully requests the Court:

- (1) Hold that the terms "China mart" and "Chinamart" are generic when referring to China market or China trading center, or a place for selling or buying Chinese goods;
- (2) Enter judgment sustaining Defendant's defenses and affirmative defenses;
- (3) Enter judgment dismissing all Plaintiff's Claims with prejudice;

- (4) Enter judgment ordering the Director of the United States Patent and Trademark Office to cancel Registrations Nos. 3537975 and 4011626 in International classes 035, 036 and 045;
- (5) Enter judgment that Defendant has a right to use "ChinaMart.com" for its business and free from interference by Plaintiff, its representatives, successors and assigns;
- (6) Enter judgment awarding Defendant attorney fees, damages and costs; and
- (7) Grant Defendant such other and further relief as the Court may deem just and proper.

Defendant's Motion for Partial Summary Judgment is supported by Defendant's Brief filed herewith. Defendant's summary judgment exhibits (designated evidence), the Declaration of Da Ouyang and the Declaration of Gary Rohland are also being filed herewith, as attachments to Defendant's Brief in support of this motion. In addition, Defendant also relies on all evidence of record previously submitted in this case.

Pursuant to W.D.Mich. L. Civ. R. 7.1(d), Defendant's counsel has contacted Plaintiff's counsel on September 27, 2013, in an attempt to obtain concurrence on this motion. Defendant's counsel was not able to obtain concurrence from Plaintiff.

Respectfully Submitted

Dated: September 30, 2013

AmeriCareers LLC d/b/a China Mart LLC

By: /s/ Nicholas D. Bowman
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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to all attorneys of record.

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